

BRIAN J. STRETCH (CABN 163973)  
United States Attorney

BARBARA J. VALLIERE (DCBN 439353)  
Chief, Criminal Division

HALLIE MITCHELL HOFFMAN (CABN 210020)  
HARTLEY M. K. WEST (CABN 191609)  
JEFF SCHENK (CABN 234355)  
Assistant United States Attorney

450 Golden Gate Avenue, Box 36055  
San Francisco, California 94102-3495  
Telephone: (415) 436-7200  
Fax: (415) 436-7234  
Hallie.Hoffman@usdoj.gov  
Hartley.West@usdoj.gov  
Jeffrey.B.Schenk@usdoj.gov

Attorneys for United States of America

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,	)	Case No. CR 14-00175 TEH
	)	
Plaintiff,	)	UNITED STATES' RESPONSE TO
	)	DEFENDANT'S SENTENCING MEMORANDUM
v.	)	
	)	Date: January 23, 2017
PACIFIC GAS AND ELECTRIC COMPANY,	)	Time: 2:30 p.m.
	)	Courtroom: G, 15th Floor
Defendant.	)	Judge: Hon. Thelton E. Henderson
	)	

1 The United States submits this Reply to defendant PG&E's Sentencing Memorandum to address  
 2 the argument that the proposed conditions of probation functionally increase the punishment above the  
 3 statutory maximum. Dkt. 906 at 19. PG&E makes this argument expressly with regard to the proposed  
 4 mandatory advertising condition, *id.* at 24, and more obliquely with regard to the proposed community  
 5 service condition, *id.* at 25.

6 "[T]he sentencing judge has broad discretion in setting probation conditions." *United States v.*  
 7 *Mitsubishi Intern. Corp.*, 677 F.2d 785, 788 (9th Cir. 1982) (citing *United States v. Lowe*, 654 F.2d 562,  
 8 567 (9th Cir. 1981)). These conditions must be "calculated to insure that the probation furthers the  
 9 purpose of the criminal law." *Mitsubishi*, 677 F.2d at 788 (citing *United States v. Tonry*, 605 F.2d 144,  
 10 148 (5th Cir. 1979). However, "the statutorily prescribed maximum sentence cannot be increased by  
 11 the terms of probation." *Mitsubishi*, 677 F.2d at 788 (citing *United States v. Atlantic Richfield Co.* 465  
 12 F.2d 58, 61 (7th Cir. 1972)); *see also United States v. Interstate Cigar Co.*, 801 F.2d 555, 556 (1st Cir.  
 13 1986); *Fiore v. United States*, 696 F.2d 205, 209 (2nd Cir. 1982) ("[S]entencing courts may not impose  
 14 conditions of probation that circumvent the statutory maximum penalties set by Congress.")<sup>1</sup>

15 This means that the court cannot impose monetary penalties as conditions of probation that  
 16 exceed the maximum fine allowed by statute. *United States v. CITGO Petroleum Corp.*, No. CRIM.A.  
 17 C-06-563, 2012 WL 4127800, at \*3-4 (S.D. Tex. Sept. 18, 2012) (rejecting condition of \$44 million  
 18 "community service payment" to charities as a monetary penalty exceeding the maximum fine allowed  
 19 by statute); *United States v. Southern Union Co.*, 942 F. Supp. 2d 235, 242 (D.R.I. 2013) (\$12 million  
 20 "community service obligation" was a monetary penalty exceeding the statutory maximum). Put  
 21 another way, "the Probation Act did not intend to authorize the district courts to direct the payments of  
 22 funds, as condition of probation, beyond the express authorizations contained in § 3651. This is not to  
 23 suggest, however, that a sentencing judge does not otherwise have broad discretion to impose conditions  
 24 of probation reasonably related to protecting the public and rehabilitating the defendant." *United States*

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26 <sup>1</sup> These cases were all decided based on a probation statute that has since been repealed, 18  
 27 U.S.C. § 3651, which allowed a court to "suspend the imposition or execution of sentence and place the  
 28 defendant upon probation. . . ." The law now in effect, 18 U.S.C. § 3653, authorizes various conditions  
 of probation in addition to a fine, so long as they are reasonably related to the purposes of § 3553(a)(1)  
 and (2).

1 *v. Perscon Corporation*, 695 F.2d 1236, 1243 (10th Cir. 1983).

2       None of the proposed probation conditions is a monetary penalty. That a condition may result in  
 3 some financial burden to a defendant does not convert it into a monetary penalty. In *United States v.*  
 4 *Danilow Pastry Co.*, 563 F. Supp. 1159, 1163-66 (S.D.N.Y. 1983), for example, a corporate offender  
 5 who manufactured pastries was ordered as a condition of probation to contribute pastries to charity. The  
 6 court recognized this condition as a form of community service. “Work in community service” is  
 7 expressly authorized by the statute governing discretionary conditions of probation, 18 U.S.C.  
 8 § 3563(b)(12). *Danilow* rejected the argument that this condition functioned as a monetary penalty:  
 9 “Any community service condition can be given a monetary value. . . . Such a construction would  
 10 severely impede judges from the ‘creative’ sentencing referred to in [*Mitsubishi*].” *Id.* at 1171.  
 11 Similarly, the proposed publicity condition – which the Sentencing Guidelines recommend for  
 12 organization defendants such as PG&E, USSG § 8D1.4 – does not constitute a monetary penalty even if  
 13 it may result in some financial burden.

14       As there is no monetary penalty beyond the fine, the proposed sentence falls within the statutory  
 15 parameters. And every one of the proposed conditions of probation is tailored – uniquely and creatively,  
 16 as corporate sentencing demands, *Mitsubishi*, 677 F.2d 785, 788 – to further the statutory purposes of  
 17 sentencing: to reflect the seriousness of the offense, promote respect for the law, provide just  
 18 punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from  
 19 further crimes. 18 U.S.C. § 3553(a)(2)(A)-(C).

20  
 21 Dated: January 13, 2017

Respectfully submitted,

22 BRIAN J. STRETCH  
 23 United States Attorney

24 /s/

25 HALLIE MITCHELL HOFFMAN  
 26 JEFFREY B. SCHENK  
 27 HARTLEY M. K. WEST  
 28 Assistant United States Attorneys